Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

FATHIREE ALI,

Petitioner,

vs.

GERALD HOFBAUER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 6TH CIRCUIT

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73 pp

QUESTIONS PRESENTED

Petitioner Fathiree Ali was charged with and convicted of first degree felony murder. Virtually all of the evidence linking him to the crime is his statement to police, admitting being involved in a breakin of the residence, but denying any involvement in the killing. A Petition for Habeas Corpus was filed raising a claim of improper admission of involuntary statement, and ineffective assistance of counsel relating to the handling of the statement matter by defense counsel. Habeas Corpus was denied by the United States District Court, and that was affirmed by the Sixth Circuit Court of Appeals. The questions presented are:

QUESTION 1: WHETHER THE COURT OF APPEALS IN A HABEAS CORPUS CASE MAY PROPERLY REFUSE TO RULE ON AN ISSUE ON WHICH THE DISTRICT COURT GRANTED A CERTIFICATE OF APPEALABILITY.

QUESTION 2: WHETHER A COURT OF APPEALS MAY PROPERLY DECLINE TO GRANT DE NOVO REVIEW OF THE CONCLUSION OF NO INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT A STATEMENT TO POLICE WAS VOLUNTARY.

QUESTION 3: WHETHER A STATEMENT TO POLICE IS INVOLUNTARY WHERE PETITIONER REFUSED TO

CONFESS FOR MANY HOURS, THEN POLICE THREATENED TO AND DID ARREST HIS WIFE WITHOUT PROBABLE CAUSE, AND BRIEFLY EXPOSED HER TO HIM AT THE POLICE STATION, EXPRESSLY DENIED HIM ACCESS TO HER, THEN LEFT HIM ALONE IN A CLOSET OR SMALL ROOM FOR 8 HOURS TO SPECULATE ON HER FATE.

QUESTION 4: WHETHER, IN A CASE WHERE THE ONLY INCULPATORY EVIDENCE IS THE DEFENDANT'S STATEMENT, DEFENSE COUNSEL FULFILLED HIS DUTY TO INVESTIGATE WHERE HE DID NOT INVESTIGATE THE CIRCUMSTANCES OF THE STATEMENT.

QUESTION 5: WHETHER DEFENSE COUNSEL WAS INEFFECTIVE FOR ADMITTEDLY FAILING TO READ THE DISCOVERY MATERIALS UNTIL TRIAL.

QUESTION 6: WHETHER, IN A CASE WHERE THE ONLY INCULPATORY EVIDENCE IS THE DEFENDANT'S STATEMENT, DEFENSE COUNSEL WAS INEFFECTIVE FOR IGNORING INFORMATION HE HAD SUGGESTING A POSSIBLY INVOLUNTARY STATEMENT, AND FAILING TO MAKE A MOTION TO SUPPRESS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 6TH CIRCUIT

FATHIREE ALI, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the 6th Circuit Court of Appeals issued May 17, 2001, with rehearing and rehearing en banc denied July 9, 2001.

OPINIONS BELOW

The following opinions below are attached in the Appendix: Sixth Circuit order denying rehearing of July 9, 2001; opinion of the Sixth Circuit affirming District Court of May 17, 2001; Sixth Circuit order of January 27, 2000; United States District Court order of July 29, 1999; United States District Court opinion denying Habeas Corpus of July 1, 1999; Michigan Supreme Court order of January 29, 1996; Michigan Court of Appeals ruling of January 30, 1995.

STATEMENT OF JURISDICTION.

This case began as a Petition for Habeas Corpus complaining of a criminal prosecution in the Recorders Court for Wayne County, Michigan. The original criminal judgment was entered November 1, 1989. The judgment denying Habeas Corpus was issued by the United States District Court July 1, 1999. The ruling of the Sixth Circuit Court of Appeals was issued May 17, 2001, with rehearing denied July 9, 2001. This Court has jurisdiction under 28 U.S.C. §1254 to review the final judgment of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Petitioner Fathiree Uddin Ali was convicted of 3 counts of first degree felony murder, murder in the course of a robbery, in Recorders Court, a state court of the State of Michigan. On November 1, 1989, Judge Denise Page Hood imposed 3 concurrent life sentences. Convicted in separate proceedings were codefendants Jessie Hilton and Kevin Campbell.

On appeal, Motions for Remand for evidentiary hearings were denied by the Michigan Court of Appeals and Michigan Supreme Court. The Michigan Court of Appeals affirmed the convictions and sentences by opinion dated January 30, 1995. The Michigan Supreme Court denied leave to appeal by order dated January 29, 1996. On January 21, 1997, Petitioner through counsel filed a Petition for Habeas Corpus with the United States District Court, Eastern District of Michigan. An evidentiary hearing was held December 21, 1998. On July 1, 1999, the Court rejected the issues of involuntary statement and ineffective assistance of counsel.

On July 29, 1999, Judge Patrick Duggan granted a Certificate of Appealability on the issues of involuntary statement and ineffective assistance of counsel, and denying Certificate of Appealability on the rest. The Sixth Circuit Court of Appeals affirmed May 17, 2001, and denied rehearing July 9, 2001.

FACTS CONCERNING THE CRIME

Officer Danny Maynard testified that three bodies, all tied with electrical cord, were found in a house at 98 W. Montana in Detroit. The house had been ransacked. (T II, 78, 85-88). A TV and VCR and money were missing from the house. (T II, 55). The three people killed suffered various blunt force injuries and wounds caused by sharp objects. (TIII, 22-48).

Clara Elston, mother of deceased Carl Gow, testified that Jessie Hilton had recently lived at the house on Montana with Gow. Kevin Campbell was Hilton's brother. (T II, 58). Carl Gow had recently kicked Jessie Hilton out of the house. (T II, 59).

Marvin Harris testified that he saw Jessie Hilton with Kevin Campbell the date of the killing, and got Hilton a butcher knife. Later, he met Hilton and Hilton and Harris visited various crack houses, with Hilton treating. (T III, 85-88).

Sgt. Ronald Sanders testified that Defendant Ali made the following statements. On March 24, 1989, Jessie Hilton and Kevin Campbell came and asked him if he wanted to make a few dollars participating in a robbery where no one would get hurt. Ali agreed and went with them. He observed Kevin Campbell demanding money from the people in the house. Jessie Hilton suggested tying them up, and did so. Defendant went upstairs and found about $500.00 in coins. When

he came downstairs he saw Kevin Campbell and Jessie Hilton strangling and stabbing the three. Defendant objected, but they went ahead anyway. Defendant tried to run away out through the alley, but a gate was locked, so he returned to the house, and left with Campbell and Hilton. (TIII, 135-148).

FACTS CONCERNING THE STATEMENT TO POLICE

On March 27 around 8:00 a.m. Petitioner Ali was arrested by police and brought to the police station. (EHT 79). From around 12:00 or 12:30 p.m. to 2:00 p.m. he was questioned by Sgt. William Rice, and denied involvement, and denied having recently seen codefendants Jesse Hilton and Kevin Campbell. (EHT 62-63, 80-81). Around 6:15 or 6:30, he was questioned by Inv. Raymond Nolan, and gave the same answers. (EHT 32-35, 83-84). He was released around 7:00 p.m. (EHT 84).

Police arrested Mr. Ali again around 11:00 p.m. (EHT 84-85). Around 11:45 he was questioned by Sgt. Sanders, and again denied involvement. (EHT 85-86). Off. Isaiah Smith then questioned him, and he again denied involvement. (EHT 86-87).

Questioning stopped around 3:30 or 4:00 a.m. on March 28, 1989. Ali asked to use the phone, and was told that "We were instructed you were not permitted to use the telephone." (EHT 91).

Ali was taken out and questioned about his property at 5:30 a.m. (EHT 92).

Around 7:30 a.m., Ali was taken to an interrogation room, and questioned about an hour later by Sgt. Rice. Ali continued to deny involvement. (EHT 93). Sgt. Rice threatened that if he did not come clean Rice could arrest his wife for murder and take away his daughter. (EHT 94). Ali asked for a lawyer. (EHT 94).

Around 12:00 or 12:30 p.m. an officer came to the interrogation room and asked Ali if he needed to use the bathroom. (EHT 94). On the way to the bathroom, Ali saw his then-wife DeFannie Ali (now DeFannie Davis). (EHT 95). She was pregnant at the time. (EHT 13-14). Ali testified she was seated right outside the bathroom. She asked him "Help me." Ali tried to talk with her and the officer would not allow it. (EHT 95-96).

Ali believed that Sgt. Rice had made good on his threat to arrest the wife if Ali did not admit his role. (EHT 145).

The officer then returned Ali to the small room or closet, where he stayed until about 8:30 p.m. During the entire time to date, Ali had been fed only once, and had very little time to sleep. (EHT 97-98).

Sgt. Sanders then came in the room. Ali asked about his wife, and Sanders said he would be told nothing until Ali gave a statement about what happened. Ali tried several times to get information, always with the same result. Sanders promised that he would advise Ali

about his wife if he admitted involvement. Finally, Ali admitted that he had been at the residence on Montana St. during the robbery and killings. Ali admitted being part of the robbery, but not part of the killings. (EHT 98-101).

Ali testified that after repeatedly denying involvement, he changed his mind after seeing his wife arrested, because of his concern for her and his baby. (EHT 100). He had not been informed that DeFannie had been released. He would not have admitted his involvement but for his concern about his wife. (EHT 101). Ali had always been protective of his wife, and gave examples of his protectiveness. (EHT 188).

DeFannie (Ali) Davis testified that on March 28, 1989, after her husband was already in custody, around 8 or 9 in the morning, police officers came and arrested her. (EHT 14-15). Their daughter was 4 or 5 at the time. (EHT 15). Friends took action to free DeFannie from the police car, which was unsuccessful. (EHT 17). Police questioned her until about 10 or 11 a.m. (EHT 17-18). She was threatened with having her daughter taken away if she did not cooperate. (EHT 21). She denied knowing about the robbery and killings. (EHT 17-18).

However, police did not let her go. They ordered her to sit in the hallway. She was there about a half an hour when police brought her husband by in handcuffs. Ali tried to talk to her but the officer told him to be quiet. She tried to talk to him and the officer told her to be

quiet. The police also would not let them talk when Ali walked past her again. (EHT 18-20). She was later released, and that night she was called by police who told her she could come down and talk to her husband because he had confessed. (EHT 21). She spoke to Ali, and he was very concerned about her and the child. A month later, she had a miscarriage. She is now divorced from Ali, and has remarried. (EHT 22).

Sgt. Sanders was unable to testify because of a stroke. (EHT 278). In state court, Sanders testified that he recalls that after Petitioner made the statement incriminating himself in the robbery, Petitioner was "allowed" to make a phone call to his wife. (T May 31 1989, 215).

Sgt. Rice testified that although Campbell and Hilton confessed to involvement in the incident on Montana St., neither of them mentioned Mrs. Ali, either by name, or otherwise. (EHT 273). No person had named Mrs. Ali as being involved either in murder or in possession of stolen property. (EHT 297).

The testimony of Lt. Alston, Off. Nolan, and Off. Smith also show no probable cause to arrest Mrs. Ali. (EHT 37, 39-40, 70-71).

Cornelius Porter arrested Mrs. Ali at the instructions of Lt. Alston. (EHT 47). The arrest book record records her as being arrested for murder. (EHT 49). The case numbers listed were for the homicides in this case. (EHT 49-50).

Clinical psychologist Dr. Michael F. Abramsky testified to reviewing many documents about the case and interviewing Mr. Ali. (EHT 247-249).

Dr. Abramsky testified as to Ali's concern about the wife, and the threats made to arrest her. The isolation, the great length of interrogation, and the associated sleep deprivation break down the "ego functions," the normal ability of a person to maintain steadiness in their personality. (EHT 254-256). Ali also had a strong paternal, protective relationship with his wife, consistent with his actions in putting his wife's needs ahead of his own by making the statement. (EHT 258). Where there was a threat to arrest the wife, following by seeing his wife in custody and not being allowed to speak with her, this would cause a person's will to be psychologically overborne. (EHT 260-261). Isolation, lack of sleep, and being prevented from sleeping by others work to effect control over the individual's mind (EHT 269).

Dr. Abramsky admitted that he had to speak hypothetically because he is not a trier of fact and is in no position to affirm that Ali's factual allegations were accurate. (EHT 266, 271-272).

FACTS CONCERNING PERFORMANCE OF COUNSEL

Attorney Monsey Wilson represented Petitioner Ali in the trial court. He testified at the evidentiary hearing that he did not remember if Ali had told him that his

wife had been arrested. He did not remember if he had asked Ali about any threats made to him. He did not remember if he told Ali that what happened to his wife was not important. (EHT 201).

Wilson remembered attending a hearing relating to statements made by defendants. He did not remember whether he called no witnesses [he had called none]. He did not remember that he filed no motion to suppress Ali's statement to police [he had filed none]. He did not remember if he ever saw Off. Porter's report regarding the arrest of Mrs. Ali. He did not remember ever interviewing Mrs. Ali. (EHT 202-203). He did remember that according to Mr. Ali, Mrs. Ali was brought to the station. (EHT 204).

Wilson did not remember if he researched the question of a person being coerced into making a statement by threats to arrest relatives. He did not remember why he filed no motion to suppress Ali's statement. (EHT 205). He testified that if he didn't call Mrs. Ali to the witness stand at the state court hearing, it was "probably" because of trial strategy. (EHT 205-206). He noted that people in Ali's situation frequently would say that the police threatened them. (EHT 215-216).

Judge Torres at the state court hearing noted that Wilson had not filed a motion. (EHT 217-218).

Wilson testified that he thought the matter of confessions was covered by what the other attorneys had filed for their clients. (EHT 224-225).

Ali testified that Wilson told him that they would be having a hearing on the voluntariness of Ali's statement to police. Ali told Wilson about the arrest of his wife. Ali testified that: "He sit there and told me the only thing I had to be concerned about was my statement and my wife -- the arrest of my wife was of no importance, it didn't matter." At the pretrial hearing, nothing was said about the arrest of his wife, Ali did not testify, and there was no motion on the table regarding Mr. Ali. (EHT 102-103).

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER THE COURT OF APPEALS IN A HABEAS CORPUS CASE MAY PROPERLY REFUSE TO RULE ON AN ISSUE ON WHICH THE DISTRICT COURT GRANTED A CERTIFICATE OF APPEALABILITY.

QUESTION 2: WHETHER A COURT OF APPEALS MAY PROPERLY DECLINE TO GRANT DE NOVO REVIEW OF THE CONCLUSION OF NO INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT A STATEMENT TO POLICE WAS VOLUNTARY.

In his order of July 29, 1999 (A14), District Judge Duggan stated "IT IS ORDERED that a certificate of appealability is GRANTED on the issues of the

voluntariness of petitioner's confession, and whether petitioner was denied the effective assistance of counsel."

Yet, the Sixth Circuit did not review the issue of the voluntariness of the statement. The Sixth Circuit ruled (A8, footnote 10): "Because this reviewing court finds that Wilson did not provide ineffective representation to Ali, this court need not reach the involuntariness issue." The reason stated was the failure of Petitioner to make a record in state court.

Case law uniformly holds that if a Certificate of Appealability is issued on an issue, the Court of Appeals must review the issue. In *Barefoot v. Estelle*, 463 U.S. 880; 103 S.Ct. 3383; 77 L.Ed.2d 1090 (1983), this Court held:

> "When a certificate of probable cause is issued by the district court, as it was in this case, or later by the court of appeals, petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal."

This rule was followed by the Supreme Court in *Lonchar v. Thomas*, 517 U.S. 314; 116 S.Ct. 1293; 134 L.Ed.2d 440 (1996). Certiorari should be granted to enforce, explain, or redefine the rule requiring that review be granted once the certificate is granted.

Concerning failure to make a state court record, the record shows that Petitioner Ali asked the Michigan Court of Appeals to grant a remand for an evidentiary hearing

on the question of voluntariness of the statement and ineffective assistance of counsel. This was denied. Counsel came into the case, and also filed a Motion to Remand. Same result. The Michigan Supreme Court denied leave to appeal both times.

Under *Williams v. Taylor*, 529 U.S. 420; 120 S.Ct. 1479 (2000), the Court held that there is a "failure" to develop facts in state court only if the Petitioner is to blame for the failure. In this case, Michigan provides a procedure for a Motion to Remand to make a record. Ali and counsel supported the request with an affidavit and police reports. It is not Petitioner Ali's fault that the Michigan Court of Appeals refused to grant the remand. Under *Williams v. Taylor*, there was no culpable failure to make a record.

The Sixth Circuit relied on "the district court's findings that Ali did not inform his counsel of the essential facts underlying his involuntary confession claim," (A8, footnote 10) without giving de novo review of that finding.

The District Court did not make findings of historical fact, that is, a finding that Petitioner did tell counsel fact A or did not tell counsel fact B. Rather, without specifying what Petitioner did tell counsel, the District Court reached the legal conclusion that the facts told by Petitioner to counsel were not sufficient to put counsel on notice of a need to investigate. Judge Duggan ruled (A23-A24):

> "This Court is satisfied that petitioner cannot establish that he was denied the effective assistance of counsel to which he is entitled. This Court does not believe that petitioner ever communicated to attorney Wilson information that would lead a reasonable attorney to believe that his confession was 'involuntarily' given. He may have mentioned to attorney Wilson something about his wife's 'arrest' – but neither petitioner's testimony nor Wilson's testimony leads this Court to believe that Wilson had reason to believe that a basis for suppressing the confession existed."

As can be seen, the District Court did not issue any factual findings at all about what Petitioner did or did not tell counsel. Instead, the District Court issued a conclusion of law that Petitioner did not give counsel enough information to give counsel reason to believe there was a basis for suppression. The District Court found that Mrs. Ali's arrest was not the 'crucial motivating factor' leading to his confession." This was a legal conclusion that is a mixed question of fact and law, to which appellate deference is not appropriate. *Cuyler v. Sullivan*, 446 U.S. 335, 344; 100 S.Ct. 1708; 64 L.Ed.2d 333 (1980). This was not a "ruling on credibility," as stated by the Sixth Circuit. (6th Cir. Opinion, A9-A10).

"An ineffective assistance of counsel claim presents a mixed question of law and fact, for which both the

state-court and district-court determinations are subject to *de novo* review by this court. *See Sims v. Livesay,* 970 F.2d 1575, 1579 (6th Cir.1992); *Smith v. Jago,* 888 F.2d 399, 407 (6th Cir.1989)." *Groseclose v. Bell,* 130 F.3d 1161 (6th Cir. 1997).

As the court held in *Ornelas v. United States,* 517 U.S. 690; 116 S.Ct. 1657; 134 L.Ed.2d 911 (1996): "We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination." An important reason for granting certiorari is: "[T]he law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law," and those effects "serve legitimate law enforcement interests."

The District Court's determination regarding voluntariness is supposed to be reviewed de novo. *United States v. Murphy,* 763 F.2d 202 (6th Cir. 1985); *Cooper v. Scroggy,* 845 F.2d 1385, 1390 (6th Cir. 1988). "[T]he appellate court must independently determine how the accused reacted to the events, and the legal significance of how he reacted. *Id.* The issue is whether the will of the accused has been overwhelmed by official pressure." *United States v. Wrice,* 954 F.2d 406 (6th Cir. 1992).

In *Miller v. Fenton,* 474 U.S. 104; 106 S.Ct. 445; 88 L.Ed.2d 405 (1985), the Court stated:

> "Without exception, the Court's confession cases hold that the ultimate issue of

> "voluntariness" is a legal question requiring independent federal determination. ... Inasmuch as it is not clear from this language that the court did in fact independently evaluate the admissibility of the confession, and because, in any event, we think that the case warrants fuller analysis under the appropriate standard, we reverse the decision below and remand for further proceedings consistent with this opinion."

This Court should grant certiorari to make clear the duties of an appellate court in reviewing the legal conclusions of a District Court concerning claims of ineffective assistance of counsel and involuntary statement.

QUESTION 3: WHETHER A STATEMENT TO POLICE IS INVOLUNTARY WHERE PETITIONER REFUSED TO CONFESS FOR MANY HOURS, THEN POLICE THREATENED TO AND DID ARREST HIS WIFE WITHOUT PROBABLE CAUSE, AND BRIEFLY EXPOSED HER TO HIM AT THE POLICE STATION, EXPRESSLY DENIED HIM ACCESS TO HER, THEN LEFT HIM ALONE IN A CLOSET OR SMALL ROOM FOR 8 HOURS TO SPECULATE ON HER FATE.

The ruling of the District Court (the Sixth Circuit did not reach the issue) shows considerable confusion about

the proper standards for judging the voluntariness of a suspect's in-custody statement to police. This Court should grant certiorari to enforce, explain, or redefine the rules regarding voluntariness of a statement. This case provides a uniquely compelling factual background by which to discuss such an issue.

The officers had interrogated Petitioner for hours. They had statements from codefendants naming Petitioner as being involved. Yet, Petitioner continued to refuse to confess. The police then decided to play hardball, by arresting Petitioner's wife, DeFannie Ali (now DeFannie Davis), who was several months pregnant at the time. The Petitioner had not implicated her in the crime, neither had Jessie Hilton or Kevin Campbell. The arrest was manifestly illegal. An arrest, to be legal, must be based on probable cause. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Baker v. McCollan*, 443 U.S. 137; 99 S.Ct. 2689; 61 L.Ed.2d 433 (1979).

Sgt. Rice testified that although Campbell and Hilton confessed to involvement in the incident on Montana St., neither of them mentioned Mrs. Ali, either by name, or otherwise. (EHT 273). No person had named Mrs. Ali as being involved either in murder or in possession of stolen property. No person had stated that they had talked to or seen Mrs. Ali. (EHT 297).

The testimony of Lt. Alston, Off. Nolan, and Off. Smith also show no probable cause to arrest Mrs. Ali. (EHT 37, 39-40, 70-71).

In *United States v. Davis*, 174 F.3d 941 (8th Cir. 1999), the Court found an illegal detention where a woman was arrested, brought to the stationhouse for questioning, but no one ever processed paperwork to charge her with anything. The Court stated that "The fourth amendment does not permit the police to detain a suspect merely to investigate." The police could have asked Mrs. Ali questions without arresting her, but the arrest was necessary to inflict fear and worry upon Petitioner Ali. And there can be little doubt this was in fact an arrest. This is shown in part by the arrest logs, showing her arrested for murder, and in part by other circumstances, such as the fact she was not free to go.

A person is in custody when "deprived of freedom of action in any significant way." *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995). Off. Porter testified that he was instructed to arrest Mrs. Ali, that he compelled her to come with him to the police station, and when her sister tried to free her the officers prevented that. (EHT 46-47).

Although police had finished questioning Mrs. Ali by 11:35 , the police continued to hold Mrs. Ali in a hallway of the police station, and marched Petitioner by her. (EHT 18-19). After Petitioner had seen her in custody, the police let her go, without telling Petitioner. Petitioner repeatedly asked the police about his wife, and was told that he would get no information until he told the police what happened. If he did talk, she would not be charged. Petitioner then confessed to participation in the

robbery where 3 people were killed.

The facts of this case are quite similar to those of *Rogers v. Richmond*, 365 U.S. 534; 81 S.Ct. 735; 5 L.Ed.2d 760 (1961). Mr. Rogers was in custody, but refused to confess. Then, the police threatened to arrest his wife, and Rogers made a statement. The Supreme Court found the statement involuntary and inadmissible under the Fifth Amendment. The instant case differs in that it is stronger, because Petitioner Ali's wife was actually arrested and brought into the police station where Ali could see her.

The rule of *Rogers v. Richmond* was still followed as recently as 1993. In *United States v. Finch*, 998 F.2d 349 (6th Cir. 1993), police executing a search warrant threatened that if the defendant did not point out the cocaine and admit it was his, they would arrest his mother and his female companion. This was held to make Finch's statements involuntary and inadmissible.

In *United States v. Guaydacan*, 470 F.2d 1173 (9th Cir. 1972) a similar thing happened, and the Court had no trouble finding the statement to be involuntary and inadmissible:

> "Defendant initially denied knowledge of the smuggling. Warned, however, that if he continued in his denials, the entire family would be taken to jail and charged with crime, he stated, 'Okay, I did it.'
>
> The confession thus obtained does not

meet constitutional standards."

The record plainly shows that the police did not arrest Mrs. Ali because of probable cause to arrest her. That leaves only one reasonable interpretation, that is, that her arrest was part of a plan to worry Petitioner Ali to the point where he would make statements against himself to avoid threatened harm to his wife.

The District Court ruled (A19-A20):

> "While it is not unreasonable for petitioner to wonder why his wife was or would be arrested for this crime, based on the facts of the crime as petitioner knew them, and it is not unreasonable for petitioner to have some concern about her presence at the station, this Court is not satisfied that the circumstances of her presence at the station are sufficient to cause petitioner to be 'compelled' to give a statement that he would not otherwise give, i.e., that such statement was thus 'involuntary.'"

It is difficult to square that ruling with *Rogers v. Richmond* and *United States v. Finch*, which each found involuntariness in similar situations. Another United States District Court, in a strikingly similar case, reached the opposite conclusion from this District Court.

In *United States v. Rivera Ruiz*, 797 F. Supp. 78 (D.P.R. 1992), the defendant was arrested and questioned,

whereupon he testified he was threatened. "The substance of the threats was to the effect that if the defendant did not cooperate, his wife of ten years and their children (ages three and nine) would be endangered. This testimony was not contradicted by the government. As confirmation of the threat, after being questioned by Special Agent Marte, the defendant briefly saw his wife in the hallway in tears...it was not until the defendant and his wife were threatened that the defendant consented to cooperate with a written confession." The Court determined that the defendant's statement must be suppressed as involuntary.

The use of pressure against a relative to extract a confession from the accused makes the statement involuntary and inadmissible, see *Lynumn v. Illinois*, 372 U.S. 528; 83 S.Ct. 917; 9 L.Ed.2d 922 (1963). Involuntary statements are not admissible. *Mincey v. Arizona*, 437 U.S. 385; 98 S.Ct. 2408; 57 L.Ed.2d 290 (1978).

Therefore, the District Court clearly erred by ruling in this case that the Petitioner cannot rely on the unjustified arrest of his wife. (A19).

Similarly, a statement is involuntary where police expressly denied the defendant access to his family until he made a statement. *Haynes v. Washington*, 373 U.S. 503, 514, 83 S.Ct. 1336, 1343, 10 L.Ed.2d 513 (1963).

Another factor of importance is the psychological effect of, after displaying the wife, placing him alone in a room for 8 hours before allowing him any human contact,

after being awakened after only 2 hours of sleep.

As the Supreme Court noted in *Malloy v. Hogan*, 378 U.S. 1; 84 S. Ct. 1489; 12 L.Ed.2d 653 (1964): "We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed." In fact, Off. Sanders testified at trial that only after Petitioner made the statement incriminating himself in the robbery was Petitioner "allowed" to make a phone call to his wife. (T May 31 1989, 215).

The District Court's ultimate ruling is "In this Court's opinion, it is more reasonable to conclude that, having learned that the other two suspects had implicated him in the crime, that petitioner gave the statement to minimize his own involvement and disclaim any involvement in the killings, rather than because of concern over his wife." (A19). Leaving aside the Circuit Court's failure to employ de novo review, it is unreasonable to lay the causation on information that Petitioner received at least 20 hours before making the statement, where, in the meantime, Petitioner steadfastly refused to confess several times, and did confess only after the wife's arrest and display.

This Court should therefore review and overturn the District Court's conclusion of voluntariness.

QUESTION 4: WHETHER, IN A CASE WHERE THE ONLY INCULPATORY EVIDENCE IS THE DEFENDANT'S

STATEMENT, DEFENSE COUNSEL FULFILLED HIS DUTY TO INVESTIGATE WHERE HE DID NOT INVESTIGATE THE CIRCUMSTANCES OF THE STATEMENT.

QUESTION 5: WHETHER DEFENSE COUNSEL WAS INEFFECTIVE FOR ADMITTEDLY FAILING TO READ THE DISCOVERY MATERIALS UNTIL TRIAL.

QUESTION 6: WHETHER, IN A CASE WHERE THE ONLY INCULPATORY EVIDENCE IS THE DEFENDANT'S STATEMENT, DEFENSE COUNSEL WAS INEFFECTIVE FOR IGNORING INFORMATION HE HAD SUGGESTING A POSSIBLY INVOLUNTARY STATEMENT, AND FAILING TO MAKE A MOTION TO SUPPRESS.

A basic question is how much information must a defendant provide to an attorney in order to place on the attorney a Sixth Amendment duty to investigate. As the Court held in *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984):

> "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, **counsel has a duty to make reasonable investigations or to make a reasonable decision that**

makes particular investigations unnecessary."

Petitioner submits that in a murder case, where the only significant evidence linking the defendant to the crime is his statement to police, that fact alone places on the attorney a duty to investigate the circumstances of how that statement came to be made, regardless of what information he gets from the defendant.

See also *Kimmelman v. Morrison*, 477 U.S. 365; 106 S.Ct. 2574; 91 L.Ed.2d 305 (1986), finding ineffective assistance of counsel from failure to investigate and file a motion to suppress. U.S. Const., Amend. VI.

Wilson admitted he did not even read the discovery until the time of trial. (EHT 202). This was ineffective assistance of counsel. *Williams v. Washington*, 59 F.3d 673 (7th Cir. 1995); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Landers v. Rees*, 782 F.2d 1042 (6th Cir. 1985). The reports covered the wife's arrest. How is an attorney to make determinations about pretrial motions, pretrial investigation, and trial strategy without reading the discovery? Wilson testified that he thought the matter of confessions was covered by what the other attorneys had filed (EHT 224-225).

It is not effective assistance of counsel for an attorney to simply ride on the coattails of the other attorneys. The interrogation of Petitioner Ali and the interrogation of the codefendants were entirely separate,

and had few or no facts in common. However, it is certainly a lot less work to do no research, do no investigation, file no motion, parrot the arguments of the other attorneys, and shoot from the hip at a hearing at which you have no motion pending.

Here, the police reports plainly informed counsel that Mrs. Ali was arrested, and that there was no probable cause for the arrest. Even if Petitioner Ali had been completely uncooperative, counsel would still have had the duty to investigate. *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991); *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989); *Ransom v. Johnson*, 126 F.3d 716 (5th Cir. 1997).

See *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988), [failure to investigate possible evidence not a legitimate tactic where lawyer did not view relevant documents that were available]. See also *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999).

What defense could defense counsel possibly present at trial more effective than suppression of Petitioner's statement to police? How could challenging the statement in a pretrial proceeding possibly harm Petitioner at trial? Even Wilson did not suggest that Petitioner would have been harmed by attorney investigation or motion.

At exactly what point does an attorney begin to have a duty to investigate? As the Court noted in *Jones v. Jones*, 988 F. Supp. 1000 (E.D. La. 1997):

> "While counsel complained at the evidentiary hearing that information didn't 'come forward,' it was his role as advocate to ask the pertinent questions and elicit information, rather than passively wait for it to be volunteered."

When Wilson heard that the wife had been arrested after Ali was in custody but before Ali confessed, he had all the facts needed to determine that this **might** be a violation of *Rogers v. Richmond*. The decision not to investigate, not to file any motion, and not to do anything about it, was unreasonable. The District Court's finding that he had no information that could lead one to a conclusion of involuntariness is clearly erroneous. Even if the information first provided to Wilson might not have led a **jurist** to **conclusively** find involuntariness, it would certainly have led a concerned **advocate** for Mr. Ali to deem the matter of involuntariness and the wife's arrest worth propounding and **investigating**.

In fact, attorney Wilson at the federal court evidentiary hearing did not dispute most of what Petitioner Ali testified to. In most cases, he indicated he simply did not remember. Attorney Wilson admitted that he was aware that Mr. Ali had complained to him about Mrs. Ali having been brought to the station, something Wilson did not pursue. (EHT 204). He admitted that Mr. Ali told him that after the confession he was permitted to meet with and have sex with his

wife, another thing he did not pursue. (EHT 204-205). Many other things were not remembered. (supra, 10-11).

Petitioner Ali is not an attorney. He may not have known every single factual element that would make a claim of involuntary statement succeed. The District Court did **not** make a factual finding rejecting his testimony that he informed Wilson about the illegal arrest of the wife, but only a finding that Petitioner did not provide Wilson with enough information to make a full-blown case for suppression. (A23-A24).

If a defendant who shoots another claims self-defense, and tells the attorney that the deceased was attacking him at the time, a reasonable attorney does not ignore what he was told, simply because the defendant did not mention that his attacker had a weapon, a necessary element of the claim. The attorney has to ask.

When the defendant gives the attorney some elements of a defense, it is the duty of counsel to ask the defendant questions, and otherwise investigate, to determine whether there was a legal issue with validity. Many facts about the illegal arrest of the wife were presented to attorney Wilson, but he asked no further questions, interviewed no witnesses, filed no motions.

In *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974), the Court stated that, to be constitutionally adequate:

> "Defense counsel must investigate all

> apparently substantial defenses available to the defendant and must assert them in a timely manner."

Of great importance is that neither the District Court nor the Sixth Circuit address in any way the failure to investigate by defense counsel, an important part of Petitioner's claim of ineffective assistance of counsel. Many cases recognize that Sixth Amendment duty. *Smith v. Dugger*, 911 F.2d 494 (11th Cir. 1990) [confession case]; *Smith v. Wainwright*, 777 F.2d 609 (11th Cir. 1985) [confession case]; *United States v. Baynes*, 687 F.2d 659, 666 (3rd Cir. 1982); *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997).

Failure of defense counsel to adequately investigate or present a defense constitutes ineffective assistance of counsel. *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998); *Washington v. Smith*, 48 F. Supp. 2d 1149, 1155 (E.D. Wis. 1999); *Beasley v. United States*, supra;; *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978); *Sullivan v. Fairman*, 819 F.2d 1382, 1391-1392 (7th Cir. 1987).

In denying this issue, the District Court applied a standard that this Court should find to be clearly erroneous (A24):

> "If Wilson also had information that even 'arguably' the confession was involuntary because it was the product of the police

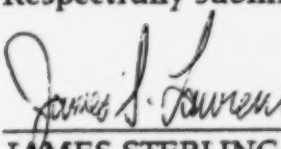
> improperly arresting petitioner's wife, the Court can see no reason why Wilson would not have included that as a ground for his request that the confession be suppressed."

From this, the District Court concluded there was no ineffective assistance of counsel. We submit the Court got it exactly backwards. When attorney action or inaction is supported by a reason, then it is not ineffective assistance of counsel. It is only when it is not supported by a good reason, as in this case, where ineffective assistance of counsel exists.

CONCLUSION

Petitioner Fathiree Ali respectfully submits that for the reasons stated above, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,



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Dated: October 2, 2001

July 9, 2001
Leonard Green, Clerk
No. 99-1875

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FATHIREE UDDIN ALI,
Petitioner-Appellant
v. ORDER

GERALD HOFBAUER, Warden,
Respondent-Appellee.

BEFORE: KRUPANSKY BOGGS and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied..

ENTERED BY ORDER OF COURT
Leonard Green
Clerk

A 2 Sixth Circuit ruling, 5/17/01

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 99-1875

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FATHIREE UDDIN ALI, Petitioner-Appellant, v. GERALD HOFBAUER, Respondent.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: KRUPANSKY, BOGGS AND BATCHELDER, Circuit Judges.

KRUPANSKY, Circuit Judge. Petitioner-Appellant Fathiree Uddin Ali ("Ali") has challenged his Michigan state imprisonment pursuant to 28 U.S.C. § 2254. He has alleged, *inter alia*, that his involuntary confession coupled with ineffective assistance of his trial counsel has deprived him of his constitutional rights to a fair trial.

Jessie Hilton ("Hilton") and Kevin Campbell ("Campbell") recruited Ali into their scheme to rob Carl Gow ("Gow"), Hilton's former housemate. Hilton wanted revenge against Gow for evicting Hilton from the Gow residence. On March 24, 1989, Ali, Hilton, and Campbell committed the robbery and murdered the three inhabitants within Gow's home. On March 26, 1989, mother discovered the lifeless remains of Gow, Theresa Navarrette, and Jeffrey Harper. The

Michigan Court of Appeals described the gruesome scene:

> All three bodies were found in the living room of Gow's house. All three had been bound with electrical cord. Navarrette, Gow, and Harper all suffered from severe head injuries caused by a blunt force object. Gow and Harper also suffered from multiple stab wounds. The police found a claw hammer, butcher knife, power drill, axe, and screwdriver which all had blood on them. There was blood spattered on the walls and ceiling of the living room and there was so much blood that it had seeped through the living room floor to the basement.

Ali v. Hofbauer, No. 89-00425 1, slip op. at 1 (Mich. Ct. App. Jan. 30, 1995).

After police investigation, Hilton, Campbell, and Ali were arrested. Hilton and Campbell quickly confessed to being involved in the robbery and the murders, [1] implicating Ali as well. Following Ali's initial arrest on March 27th, he denied any involvement in the crime; instead, he identified four individuals as alibi witnesses attesting to his whereabouts on March 24th: his wife, Tracy Johnson, Marlene Mills, and Brian Morgan. Later that day, in a second statement, Ali related the circumstances of a pre-March 24, 1989 altercation between him and Hilton, which Ali claimed was the last occasion upon which he had seen Hilton. The authorities then released Ali. At 11:15 P.M. that same

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[1] Each defendant accused the other two of being more deeply involved in the murders.

evening, March 27, 1989, he was rearrested on a murder charge. He was again questioned about the events of March 24th. Officer William Rice testified that Ali made an oral statement [2] at 3:30 A.M., but refused to sign any written account of what he had said. Officers returned Ali to the interrogation room at 7:30 A.M. the following day and commenced questioning him. Ali has asserted that, at this point, Officer Rice indicated that he would arrest Ali' s wife and his four-year-old child and charge them with murder if he refused to confess. Later, on his way to the men's restroom, Ali saw his wife, [3] her sister, Marlene Mills, and Brian Morgan. [4] The officer escorting Ali refused to permit him to speak with his wife. When his interrogation resumed at approximately 8:30 P.M., he made further inquiries about his wife and was told that he would be informed of her status at a later time. Subsequently, Ali confessed to the robbery, [5] in a twenty-four page statement, but disclaimed any involvement in the related murders. [6] Before each interrogation, the police

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2 Ali indicated that he was present at the scene of the robbery and murders, but refused to comment further.

3 His wife had been detained at approximately 9 A.M. and interrogated. She claimed to have no knowledge of the robbery or murders. She was released soon after Ali saw her in the hall.

4 Of the four individuals, Ali perceived only Morgan to be manacled.

5 A stereo, a television set, and $400 in cash were stolen from the Gow residence on the night of the murders.

6 Ali indicated in his statement that he had sold the stereo to an anonymous buyer on the street. The next day, March 29th, Ali admitted he had lied in his previous statement about

officers informed Ali of his *Miranda* [7] rights, and Ali signed written statements confirming that he had been so informed.

Before trial, the state trial court conducted a hearing on the admissibility of the various confessions made by the three defendants. Ali's trial counsel, Monsey Wilson ("Wilson"), argued that the police coerced Ali to confess by using several different investigators to interrogate him over an extended period of time. Wilson did not argue or produce evidence to the court that Ali's confession was caused by an unjustified detention of Ali's wife. On June 8, 1989, the state trial court refused to suppress the confession, ruling that Ali was aware of his rights and had not been coerced into confessing.

On October 20, 1989, the state trial court found Ali guilty of three counts of aiding and abetting felony murder. On November 1, 1989, Ali was sentenced to three concurrent life sentences. He timely filed a *pro se* appeal of his conviction to the Michigan Court of Appeals. He petitioned for remand to the lower court with instructions to conduct an evidentiary hearing to determine (1) if his confession to police was voluntary, given the detention of his wife; and (2) if his trial counsel had provided ineffective assistance. On February 27, 1991, the state court of appeals denied his request. Ali then retained counsel, who reinstituted the motion to remand. On May 21, 1993, the court of appeals denied the renewed motion to remand. On November 30, 1993, the Michigan Supreme Court denied Ali's interlocutory appeal from the court of appeals' denial of the motion to remand. On January 30, 1995, the court of appeals affirmed Ali's convictions and sentences. On January 29, 1996, the Michigan Supreme

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the whereabouts of the stereo taken from the Gow residence. He admitted that he had given the stereo to his brother to sell.

[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Court denied leave to appeal.

After exhausting his state court avenues of review, on January 21, 1997, Ali filed a petition for habeas relief in the Eastern District of Michigan. He alleged that seven instances of error infected the convictions: (1) the evidence of his participation in the March 24, 1989 robbery was insufficient to prove his vicarious guilt of felony murders committed by his accomplices; (2) the state prosecutor had denied him a fair trial by arguing in closing, without supporting evidence, that petitioner had personally committed the three killings; (3) petitioner's statement to police should have been suppressed because it had been coerced by the unjustified arrest of his pregnant wife, and the state court of appeals denied him due process by refusing to remand to the trial court for an evidentiary hearing; (4) the trial court had denied him a fair trial, as well as his right to compulsory process to compel witness testimony, by allowing a person called as a defense witness to refuse to testify; (5) the trial court improperly instructed the july regarding inferences to be drawn from the use of a weapon; (6) the court's instructions emphasized that he did not testify; (7) he had ineffective assistance of counsel at trial.

On July 22, 1998, the district court denied habeas relief on all theories except the voluntariness of Ali's confession and his charge asserting ineffective assistance of his trial counsel, and the district court ordered an evidentiary hearing as to these two claims, finding that Ali was presumably" [8] without fault for the failure to develop a factual basis in the state court system for the two claims. [9]

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[8] *Ali v. Hofbauer*, No. 97-70236, slip. op. at 27 (E.D. Mich. Jul. 22, 1998).

[9] 8 U.S.C. § 2254(e)(2) provides:

On December 21, 1998, the district court conducted its previously ordered evidentiary hearing to resolve the issues of ineffective assistance of counsel and the voluntariness of Ali's confession. On July 1, 1999, the district court denied habeas relief, finding that Ali's confession was voluntary, and that his trial counsel had not been ineffective.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

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> If the applicant has *failed* to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added). The district court's presumptive finding of diligence rested on Ali's claim that he had informed his trial counsel about the interrogating officer's threat to arrest his wife and Ali's properly filed motions to remand in the state court system to develop a factual basis to support his two charges.

relied on as having produced a just result. [10] *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed, a claim of ineffective assistance of counsel must be supported by competent evidence which demonstrates that (1) the counsel committed error(s) such that the representation fell below an objective standard of reasonablness; and (2) the error(s) prejudiced the defense. *Id.* at 687. "With regard to the performance prong of the inquiry, ...[j]udicial scrutiny of performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000).(quoting *Strickland*, 466 U.S. at 689).

Wilson's performance did not fall below an objective standard of reasonableness because Wilson was not aware of any facts which would have suggested that the brief detention

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[10] Because this reviewing court finds that Wilson did not provide ineffective representation to Ali, this court need not reach the involuntariness issue. See 28 U.S.C. 2254(e)(2)("If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim (unless certain requirements are satisfied.)"; *Williams v. Taylor*, 529 U.S. 420, 432 (2000)("Under the opening clause of 2254(e)(2), a failure to develop the factual basis of a claim is not established under there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel."). Given the district court's finding that Ali did not inform his trial counsel of the essential facts underling his involuntary confession claim, the failure to develop a factual basis in the state court system is directly traceable to Ali.

of Ali's wife caused him to confess. *See Strickland*, 466 U.S. at 691 ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."); *Dooley v. Petsock*, 816 F.2d 885, 890-91 (3rd Cir. 1987) ("A trial counsel cannot be ineffective for failing to raise claims as to which his client has neglected to supply the essential underlying facts when those facts are within the client's possession; clairvoyance is not required of effective trial counsel."). Although Ali testified that he told Wilson that the sight of his wife in police custody, coupled with the interrogating officer's statement that Ali's refusal to confess would result in her being charged with murder, compelled his involuntary confession, the district court, upon reviewing the evidence developed during its conducted hearing, elected to assign greater credibility to Wilson's testimony that Ali had not advised Wilson of Ali's version of his wife's brief detention and his compelled involuntary confession, and that Wilson was unaware of any other facts which would have suggested that Ali's wife's brief custody caused petitioner's involuntary confession:

> This Court is satisfied that petitioner cannot establish that he was denied the effective assistance of counsel to which he is entitled. This Court does not believe that petitioner ever communicated to attorney Wilson information that would lead a reasonable attorney to believe that his confession was "involuntarily" given. He may have mentioned to attorney Wilson something about his wife's "arrest" — but neither petitioner's testimony nor Wilson's

> testimony leads this Court to believe that Wilson had reason to believe that a basis for suppressing the confession existed.

Ail v. Hofbauer, No.97-70236, slip op. at 9-10 (E.D. Mich. Jul. 1, 1999) (citations omitted). As a result of its credibility findings, the district court concluded that Wilson's performance did not fall below any objective standard of reasonableness. Ali has not demonstrated that this credibility finding was without foundation. *See Gonzales v. Elo,* 233 F.3d 348, 357 (6th Cir. 2000) ("[T]his court does not disturb [judgments based solely on] issues of credibility.").

The judgment of the district court is accordingly **AFFIRMED.**

Jan 27, 2000
Leonard Green, Clerk
No. 99-1875
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FATHIREE ALI,
Petitioner-Appellant,
v. ORDER
GERALD HOFBAUER,
Respondent-Appellee.

BEFORE: MARTIN, Chief Judge.

Fathiree Uddin Ali appeals a district court judgment denying his petition for habeas corpus relief pursuant to 28 U.S.C 2254 and he moves for a certificate of appealability on the issues not so certified by the district court. Fed. R. App. P. 22(b). Upon review, the court denies the present motion for a certificate of appealability as to all remaining issues. Therefore, the only issues for appellate review, as certified by the district court, are:

1) Whether Ali's confession was involuntary as a result of the unjustified arrest of his wife.

2) Whether Ali received ineffective assistance of trial counsel with respect to the issues surrounding the aforementioned confession.

Accordingly, the motion for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

A 12 **US District Court Order, 7/29/99**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FATHIREE UDDIN ALI,
Petitioner.

v.

CASE NO. 97-CV-70236-DT
HON. PATRICK J. DUGGAN

GERALD HOFBAUER,
Respondent.

ORDER GRANTING PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY

At a session of said Court held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on
JUL 29 1999

HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On July 22, 1998, this Court issued an Opinion and Order, and on July 1, 1999, issued an Opinion and entered a Judgment denying petitioners' petitioner [sic] for a write of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed a notice of appeal on July 22, 1999. Currently before the Court is petitioners' 'motion to issue certificate of appealability," pursuant to FED. R. APP. P. 22(b).

28 U.S.C. § 2253 governs appeals in habeas

proceedings. Section 2253 states in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certiuficate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

See also Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1073 (6th Cir.), *cert. denied*, 510 U.S. 1224, 117 S. Ct. 1724, 137 L.Ed.2d 845 (1997). FED. R. APP. P. 22(B)(1) states: "If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." *See also Kincade v. Sparkman*, 117 F.3d 949, 953 (6thcir. 1997) (holding that Rule 22(b) requires district court to make the initial determination of appealability). In granting a certificate of appealability, the Court must indicate the specific issue or issues for which the applicant made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c).

Petitioner has filed a notice of appeal relating to this Court's rejection of his challenges to the following issues:

sufficiency of the evidence of his conviction, allegedly improper comments by the prosecutor, prohibiting a defense witness from testifying, improper instructions on the presumption of intent, allegedly involuntary statement, and ineffective assistance of counsel. While the Court continues to believe that petitioner is not entitled to habeas relief for the reasons set forth in hits July 22, 1998 and July 1, 1999 Opinions, nevertheless, this Court does not believe that petitioner should be denied the opportunity to seek appellate revier on the issues of the voluntariness of his confession and the denial of the effective assistance of counsel, the issues for which petitioner was granted an evidentiary hearing by this Court. Therefore, the Court concludes that the petitioner has made the required "substantial showing of the denial of a constitutional right" and is entitled to a certificate of appealability for the two aforementioned issues.

Accordingly,

IT IS ORDERED that a certificate of appealability is **GRANTED** on the issues of the voluntariness of petitioner's confession, and whether petitioner was denied the effective assistance of counsel.

PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FATHIREE UDDIN ALI,
Petitioner.

v.

CASE NO. 97-CV-70236-DT
HON. PATRICK J. DUGGAN

GERALD HOFBAUER,
Respondent.

OPINION

On January 21, 1997, petitioner filed a habeas corpus petition under 28 U.S.C. § 2254 asserting various grounds for relief. On July 22, 1998, this Court issued an Opinion and Order denying petitioner relief on all of the grounds asserted in the petition except for petitioner's claim that he was denied the effective assistance of counsel with respect to his assertion that his confession was coerced as a result of an unjustified arrest of his wife. With respect to this claim, the Court concluded that petitioner was entitled to an evidentiary hearing.

An evidentiary hearing was held on this claim on December 21, 1998. Petitioner called numerous witnesses with respect to his claims:

> (1) that his wife was "arrested" and brought to the police station where he was being

questioned;

(2) that he observed his wife, who was pregnant at the time, in the hallway at the police station and that he was denied any opportunity to converse with her;

(3) that he gave the statement "involuntarily" because of his concern about his wife's well-being in view of the fact that she had, in petitioner's view, been unlawfully arrested. Petitioner testified that he gave the twenty-four page incriminating statement only because Sgt. William Rice told petitioner that if he did not, "come clean" that he, Sgt. Rice, "can arrest your wife and daughter and charge them with murder." [1] (Tr. 94).

Subsequent to this conversation, petitioner asked to go to the restroom and while he was being escorted to the restroom, he saw Tracy Johnson, a friend of his, Marlene Mills, his cousin, and her boyfriend Brian, and that Brian was handcuffed. After walking a little further, he saw his wife and her sister (his sister-in-law). (Tr. 95). These events took place around 12:00 or 12:30 p.m. (Tr. 94). Petitioner was then returned to the interrogation room.

Petitioner did not see anyone else until Sgt. Sanders came in to interrogate him about 8:30 or 8:45 p.m. (Tr. 97). Petitioner claims that he asked Sgt. Sanders several times about his wife but that Sgt. Sanders "kept telling me that he would answer no question until I gave a statement to my

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[1] Petitioner "believed" his daughter was "four or five" years of age at the time. (Tr. 15).

involvement of the crime." (Tr. 99). Petitioner then gave the twenty-four page statement that he claims was given involuntarily and should not have been introduced at trial.

In that statement, he admitted that he was present at the scene of the homicide, that he participated in the robbery, but he "claimed to have no involvement in the killings." (Tr. 100). Petitioner had previously denied any involvement. Petitioner asserts that he changed his mind because he was concerned about his wife. "After seeing her being arrested, my concern was her and my baby." (Id.). He further asserts that if he admitted his involvement, Sgt. Sanders promised that he, Sgt. Sanders, would advise petitioner of his wife's status. [2] He further testified that he would not have admitted his involvement except for his concern about his wife. (Tr. 101). [3]

Ali had previously given two or three statements in which he denied any involvement. However, prior to giving the incriminating statement, Ali was advised that the other two suspects, Jesse Hilton and Kevin Campbell had given statements in which they incriminated Ali. (Tr. 93-94).

There are two basic issues that must be resolved by the Court, in favor of Ali, in order for Ali to prevail on this claim:

(1) Did petitioner give the twenty-four page "confession" as a result of coercion, i.e., was it an involuntary statement? To reach this conclusion, the Court must find:

(a) that Sgt. Rice did, in fact, tell Ali that if he did not "come clean" Sgt. Rice "could arrest his wife for murder;"that

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[2] After petitioner gave the statement, Sgt. Sanders advised him that his wife had been released. (Tr. 101).

[3] Petitioner testified: "My concern was her and my baby" and that is why he changed his mind and admitted his involvement. (Tr. 100-101).

the detaining of petitioner's wife was, in fact, the reason petitioner gave the incriminating statement, i.e., that he gave the statement because he was concerned about his wife's well being.

(2) Did petitioner receive ineffective assistance of counsel because trial counsel never challenged the admission of the statement?

(1) Was the statement "involuntary?"

To be admissible, a confession must be free and voluntary; it must not be procured by threats or violence, or obtained by any direct or implied promises, or by the exertion of improper influence. *Hutto v. Ross,* 429 U.S. 28, 30, 97 S. Ct. 202,203-204,50 L. Ed. 2d 194 (1976) (citation omitted). The test for voluntariness of a confession involves three factors: 1) whether the police used coercive activity in obtaining the confession; 2) whether the coercion was sufficient to overbear the will of the accused; and 3) whether the accused's will was overborne because of the coercive police activity. *See McCall v. Dutton,* 863 F.2d *454,* 459(6th Cir. 1988). If coercion by a law enforcement agent was not the "crucial motivating factor" behind a defendant's decision to confess, the confession may not be suppressed. *See id.* (citing *Colorado v. Connelly,* 479 U.S. 157, 107 S. Ct. 515,93 L. Ed. 2d473 (1986)). In determining the voluntariness of a confession, it is necessary to examine the totality of the circumstances surrounding the confession. *See United States v. Murphy,* 107 F.2d 1199, 1205 (6th Cir. 1997).

Respondent contends that petitioner's statement was not given involuntarily because of petitioner's concern about his wife. Respondent argues that, at the time petitioner gave his statement, he had been informed that the other two

suspects had implicated him and it was in petitioner's own best interest to admit to involvement in the robbery and deny any involvement in the killings.[4]

In this Court's opinion, it is more reasonable to conclude that, having learned that the other two suspects had implicated him in the crime, that petitioner gave the statement to minimize his own involvement and disclaim any involvement in the killings, rather than because of his concern over his wife. Based on his testimony, when petitioner observed his wife, she was with his wife's sister and, unlike Brian, she was not handcuffed. In all, petitioner saw five people and nothing to which petitioner has testified convinces this Court that he had reason to be so concerned about his wife that he would "involuntarily" give a statement detailing his involvement in the crime.

Accepting petitioner's claim that the evidence presented does not show that the police had probable cause to arrest his wife, nevertheless, it is clear that the police were investigating a homicide. While they may have not been legally correct in "compelling" individuals to come to the station (if that, in fact, is what happened); nevertheless, this Court does not believe that the "illegal" arrest of others can be relied upon by petitioner to explain why he "involuntarily" gave the statement. While it is not unreasonable for petitioner to wonder why his wife was or would be arrested for this crime, based on the facts of the crime as petitioner knew them, and it is not unreasonable for petitioner to have some concern about her presence at the station, this Court is not satisfied that the circumstances of her presence at the station are

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[4] As it turned out, despite petitioner's statement that he was only involved in the robbery and not involved in the killings, petitioner was charged with and convicted of felony murder.

sufficient to cause petitioner to be "compelled" to give a statement that he would not otherwise give, *i.e.*, that such statement was thus "involuntary."

(2) Did petitioner receive ineffective assistance of counsel?

Even if this Court were to conclude that petitioner's statement was involuntary, because it was improperly induced by the police arresting petitioner's wife without probable cause and causing petitioner to have undue concern about his wife, petitioner still may not prevail on his petition for writ of habeas corpus unless he can establish that he was denied the effective representation to which he was entitled.

With respect to this issue, petitioner contends that he informed his attorney, Monsey Wilson, about the facts and circumstances surrounding his giving of the statement that he contends was involuntarily given. Petitioner testified, at the evidentiary hearing on December 21, 1998, as follows:

> Q. Okay. Did you inform him [attorney Wilson] of any of the events concerning the arrest of Defannie and your seeing her in the hallway and not being permitted to talk to her?
>
> A. Well, he had asked him with regards to the events on Montana Street. He asked me in regards to — to tell him what happened. And so I told him that, you know, what happened in regards to those events, as well as that, you know, they had arrested my wife and I was allowed to visit her — visit with her afterward.

> Q. Okay. And did he have any reaction to your comments about the events, about the arrest of your wife?
>
> A. He sit there and told me the only thing I had to be concerned about was my statement and my wife — the arrest of my wife was of no importance, it didn't matter.

(Tr. 102-103) (emphasis added).

Although petitioner claims in this petition that the only reason he gave the statement was because Sgt. Rice had threatened to arrest his wife and because of his concern for his wife after seeing her at the police station, petitioner did not testify at the hearing on December 21, 1998, that he told attorney Wilson that he gave the statement only because of the arrest of his wife or because of his concern for his wife.

Petitioner contends that attorney Wilson was ineffective in not seeking to suppress the confession in a pretrial hearing, *e.g.*, a *"Walker"* hearing[5] or some other motion in limine and/or attorney Wilson was ineffective because, when the confession was introduced at trial, attorney Wilson did not bring, to the attention of the jury, that it was not a "free and voluntary" confession and therefore the jury should reject it. The record of the pretrial proceedings and the trial, clearly reflect that attorney Wilson did not claim in any proceeding that petitioner's statement should be suppressed because it was obtained as a result of

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[5] *See People v. Walker*, 374 Mich. 331(1965).

the illegal arrest of petitioner's wife and petitioner's concern for his wife.[6]

Wilson testified at the hearing on December 21, 1998, that he has no recollection of petitioner ever informing him that he gave the statement because the police had threatened to, or had arrested his wife, or because the police told petitioner that they would not release his wife until he made a statement. Attorney Wilson further testified that had petitioner told him that, "I would have raised it at the hearing." (Tr. 230). Wilson further testified that he has no recollection of petitioner requesting, during the trial itself, that Wilson challenge the reliability of the statement by bringing to the jury's attention that it was made only because his wife had been arrested. Wilson's only recollection is that petitioner wanted co-defendant Campbell to testify but that Mr. Campbell's lawyer advised Wilson that Campbell would not testify. (Tr. 231).

Wilson further testified that, he has no recollection, subsequent to trial, that petitioner ever inquired of him as to why he, Wilson, did not at some point move to suppress the confession, or at least challenge it on the basis that it was given by petitioner only because of the arrest of his wife.

In order to establish ineffective assistance of counsel, petitioner must show "that counsel's performance was deficient... [and] that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 5. Ct. 2052, 2064, 80 L. Ed. 2d. 674(1984); *accord O'Hara v.*

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[6] At a pretrial hearing on June 1, 1989, attorney Wilson did request that the court suppress the statements, arguing, at that time, that defendant's "will was overborne" as a result of the length of time he was held in custody and interrogated. (Evid. Hr'g 6/1/89 at 113-114).

Wigginton, 24 F.3d 823, 828(6th Cir. 1994). An analysis under *Strickland* first requires a court to determine whether counsel's performance was deficient. Deficiency requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *0 'Hara*, 24 F.3d at 828. In determining whether counsel's performance was deficient:

> The court must. . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.... At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.[7]

This Court is satisfied that petitioner cannot establish that he was denied the effective assistance of counsel to which he is entitled. This Court does not believe that petitioner ever communicated to attorney Wilson information that would lead a reasonable attorney to believe that his confession was "involuntarily" given. He may have mentioned to attorney Wilson something about his wife's

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[7] The Court recognizes that, in addition to establishing that the representation was "deficient," a petitioner must also show that he was prejudiced by such "deficient" performance. The Court is satisfied that, in this case, petitioner was clearly "prejudiced" by the introduction of the statement.

"arrest" — but neither petitioner's testimony nor Wilson's testimony leads this Court to believe that Wilson had reason to believe that a basis for suppressing the confession existed. As previously indicated, Wilson, did in fact, argue that the confession should be suppressed because of the extensive period of time that petitioner was detained. *See* discussion, *supra*, fn.6. If Wilson also had information that even "arguably" the confession was involuntary because it was the product of the police improperly arresting petitioner's wife, the Court can see no reason why Wilson would not have included that as a ground for his request that the confession be suppressed.

The record reflects that attorney Wilson has been practicing law in the criminal law field for twenty-five years and that he has tried a large number of first degree murder cases and capital cases. The Court is simply not persuaded that if attorney Wilson had information from his client that the confession was produced because the police had threatened to, or did in fact, arrest petitioner's wife without any justification, that attorney Wilson would not have sought to suppress the confession.

Conclusion

For the reasons set forth above, petitioner's application for habeas corpus relief shall be denied.

A Judgment consistent with this Opinion shall issue forthwith.

July 1, 1999
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Order
Entered: January 29, 1996

Michigan Supreme Court
Lansing. Michigan

102505

James H. Brickley.
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr
Elizabeth A. Weaver
Justices

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 102505
COA: 125272
LC: 89-4251

FATHIREE ALI,

Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certifiy that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 29, 1996 /s/ Corbin R. Davis

A 26 Michigan Court of Appeals ruling, 11/28/95

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 30, 1995
No. 25272
LC No. 89-004251

v.

FATHIREE ALI,
Defendant-Appellant.

Before: Hood, P.J., and Jansen and A.T. Davis, Jr., * JJ.

PER CURIAM.

Following a jury trial in the Detroit Recorders Court, defendant was convicted of three counts of felony murder, MCL 750.316; MSA 28.548. He was thereafter sentenced to three concurrent terms of mandatory life imprisonment without parole. Defendant appeals as of right and we affirm.

This case involves the brutal murders of Carl Gow, Theresa Navarette, and Jeffrey Harper on March 24, 1989 in the City of Detroit. All three bodies were found in the living room of Gow's house. All three had been bound with electrical cord. Navarette, Gow and Harper all suffered from

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*Circuit judge, sitting on the Court of Appeals by assignment.

severe head injuries caused by a blunt force object. Gow and Harper also suffered from multiple stab wounds. The police found a claw hammer, butcher knife, power drill, axe, and screwdriver which all had blood on than. There was blood spattered on the walls and ceiling of the living room and there was so much blood that it had seeped through the living room floor to the basement. Defendant was arrested on March 27, 1989. He gave several police statements, and ultimately inculpated himself after first denying any involvement in the crimes.

Defendant now raises a total of seven issues on appeal. None of these require reversal.

I

Defendant first argues that there was insufficient evidence on the malice element to convict him of felony murder. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. People v Wolfe, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201(1992).

The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the felonies specifically enumerated in MCL 750.316; MSA 28.548. People v Thew,

201 Mich App 78, 85; 506 NW2d 547 (1993). Robbery is one of the felonies enumerated in the statute.

The intent to commit the underlying felony (here, armed robbery) can no longer be equated with the intent to murder. People v Aaron, 409 Mich 672, 727; 299 NW2d 304 (1980). The element of malice required for felony murder is the same as that required for second-degree murder: the intent to kill, the intent to do great bodily harm, or the wanton and wilful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. Id., p 728. A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. If the jury concludes that malice existed, it can find murder and, if it determines that the murder occurred in the perpetration or attempted perpetration of one of the enumerated felonies, then the murder becomes first-degree murder by statute. Id., pp 729-730.

In this case, defendant was charged as an aider and abettor. In order to convict a defendant as an aider and abettor of felony murder, the prosecutor must show that the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder. Thus, the prosecutor must show that the aider and abettor bad the intent to commit the underlying felony and the intent to kill, the intent to create great bodily harm, or the intent to wantonly and wilfully disregard the likelihood of the natural tendency of the behavior to cause death or great bodily harm. If it can be shown that the aider and abettor participated in the crime with knowledge of the principal's intent to kill or to cause

great bodily harm, then the aider and abettor was acting with wanton and wilful disregard sufficient to support a finding of malice. People V Flowers, 191 Mich App 169. 178; 477 NW2d 473 (1991).

Defendant's police statement sufficiently supports the malice element. Codefendants Kevin Campbell and Jessie Hilton picked up defendant at his house. Campbell asked defendant if he was interested in making a few dollars by robbing a house. Defendant agreed to go with them. Campbell drove to the planned house. Campbell and Hilton put on leather gloves. Defendant, who is left-handed, then put a leather glove on Ins left hand. Before exiting the car, Campbell and Hilton reached for knives under the car seat. Campbell bad a butcher knife and Hilton had a six-inch steak knife. After the three men entered the house, defendant locked the side door. One man in the house gave Campbell some money while Hilton went upstairs. When Hilton said he could only find a couple hundred dollars, defendant went upstairs to look for more money. Hilton suggested that they tie up the three people as defendant went upstairs. Defendant found approximately $400.

As defendant came downstairs, Campbell was strangling the woman while Hilton was strangling one of the men. Campbell handed Hilton a knife and Hilton proceeded to stab the man. While defendant carried stereo equipment out of the house, Campbell and Hilton beat and stabbed Gow, Navarette, and Harper. Defendant denied stabbing, beating, or strangling any of the three people. Eventually, defendant and his codefendants left and drove to defendant's house. There, the $750 taken was divided among the three of them. Campbell took a shower because he was soaked with blood.

Defendant washed Campbell's clothes in his washing machine.

Under these circumstances, defendant's police statement provides sufficient evidence for the jury to infer that defendant acted with a wanton and wilful disregard of the likelihood that the natural tendency of his behavior would cause death or great bodily harm. Defendant clearly participated in the armed robbery with two other men and intended to rob the house. Considering that defendant knew that both codefendants entered the house with knives and tied the people up in the house, defendant acted with wanton and wilful disregard sufficient to support a finding of malice.

II

Defendant next argues that the prosecutor's remark at closing argument denied him a fair trial. Specifically, defendant objects to the remark by the prosecutor that, "I think Mr. Ali directly committed some of the killings in this case."

Defendant did not object to this remark at trial. Appellate review is generally precluded absent an objection because the trial court is otherwise deprived of an opportunity to cure any error. People v Stanaway, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists where a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. Id.

We find that the prosecutor's remark was not improper. Taken in its context, the prosecutor was arguing that the jury

could infer that, in considering all of the evidence presented, defendant was more involved in the killings that he admitted. A prosecutor may argue that the defendant is not worthy of belief or is lying. People v Gilbert, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Defendant was not denied a fair trial by the prosecutor's remark when it is viewed in its proper context. People v Mack, 190 Mich App 7, 19; 475 NW2d 830(1991).

III

Defendant next argues that he was denied a fair trial and his right to compulsory process because the trial court allowed codefendant Campbell to not testify. Campbell was called to testify but asserted his right against self-incrimination. At the time of defendant's trial, Campbell had already been convicted by a different jury, but his convictions were being appealed.

The privilege against self-incrimination applies when an appeal is pending after conviction on a charge to which the incriminating testimony would relate; People v Robertson, 87 Mich App 109, 114; 273 NW2d 501 (1978). Campbell's appeal was still pending during defendant's trial. Accordingly, Campbell properly asserted his Fifth Amendment privilege against self-incrimination and the trial court could not compel Campbell to testify. Defendant was not denied his right to compulsory process under these circumstances.

IV

Defendant next argues that the trial court improperly

instructed the jury concerning defendant's decision to not testify without first ascertaining whether counsel wanted that instruction to be given.

Defendant did not object to this instruction below. Absent an objection, relief will only be granted in cases of manifest injustice. People v Van Dorsten, 441 Mich 540, 544-545; 494 NW2d 737 (1993). There is no manifest injustice in this case. The trial court's instruction was entirely in accord with the law and defense counsel did not request that the trial court not give the instruction. CJI2d 3.3; *People v. Hampton*, 394 Mich 437, 438; 231 NW2d 654 (1975).

V

Defendant next argues that the trial court improperly instructed the jury regarding inferences to be drawn from the use of a weapon. Because defendant did not object to this instruction at trial, we will review it only for manifest injustice. Van Dorsten, supra.

Defendant contends that the court's instruction forced the jury to infer that he had the intent to murder. Defendant's argument is meritless. The trial court instructed the jury that it infer an intent to kill from the use of a dangerous weapon when used in a manner that death was plainly likely and that the jury *may* infer that a person intended the usual results that follow from the use of a dangerous weapon. The trial court's instruction was proper and clearly did not force the jury to infer that defendant had the intent to murder.

VI

Defendant next argues that his police statement should have been suppressed because it was coerced by the unjustified arrest of his pregnant wife.

The issue of voluntariness is a question of law for the court's determination. People v Walker (On Rehearing), 374 Mich 331, 338; 132 NW2d 87 (1965). The prosecution must prove voluntariness by a preponderance of the evidence. In reviewing the trial court's findings, this Court examines the entire record and makes an independent determination of voluntariness. Recognizing the trial court's superior ability to view the evidence and judge credibility, we give deference to the trial court and will not reverse unless the trial court's findings are clearly erroneous. People v Etheridge, 196 Mich App 43, 57; 492 NW2d 490 (1992).

The trial court's finding that defendant's confession was voluntary is not clearly erroneous. Defendant's claim that his pregnant wife was arrested to coerce his confession is not part of the lower court record. Defendant's attempt to supplement the record on appeal is improper and we will not consider any facts not part of the lower court record. Nationwide Mutual Ins Co v Quality Builders, Inc, 192 Mich App 643, 648; 482 NW2d 474 (1992). Rather, the totality of the circumstances surrounding the confession indicates that it was freely made. People v Cipriano, 431 Mich 315, 334; 429 NW2d 781 (1988). The trial court properly applied the factors set forth in Cipriano and its finding that the statement was freely and voluntarily made is not clearly erroneous.

VII

In his final claim, defendant argues that he was denied the effective assistance of counsel. Defendant argues that

counsel was ineffective for failing to introduce evidence at the *Walker* hearing that his pregnant wife was arrested to coerce his confession, that counsel failed to compel Campbell to testify, that counsel failed to object to the prosecutor's comment (see Issue II), and that counsel failed to object to the court's instruction (see Issue V).

Having rejected the merits of these claims previously, we find that the record does not support defendant's claim that he was denied the effective assistance of counsel. Counsel's performance neither fell below an objective standard of reasonableness nor was the representation prejudicial to defendant. People v Pickens, 446 Mich 298, 309; 521 NW2d 797 (1994).

Affirmed.

/s/ Harold Hood
/s/ Kathleen Jansen
/s/ Alton T. Davis, Jr.